

Application Serial No. 10/524,700

Attorney Docket No. 10191/3804

Second Supplemental/Replacement Reply to

Office Action of January 25, 2008 & Notice of May 12, 2009

AMENDMENTS TO THE DRAWINGS:

As specifically suggested in the Office Action, Figure 2(B) now includes a “t” for a time label on the X-axis (similar to that of Figure 2(A)). Figure 3(B) now includes a “t” for time label on the X-axis (similar to that of Figure 3(A)). Approval and entry are respectfully requested.

Attachments: one (1) Replacement Sheet and one (1) ANNOTATED Sheet (showing the added “t” in red in Figure 2(B) and the added “t” in red in Figure 3(B)).

REMARKS

Claims 13 to 17 are added, claim 9 is canceled without prejudice, and therefore claims 7, 8, and 10 to 17 are now pending.

In view of the following, it is respectfully submitted that all of the presently pending claims are allowable, and reconsideration is respectfully requested.

Applicants thank the Examiner for making of record the references of the IDS and 1449 papers filed to date.

The Office objected to Figures 2(B) and 3(B) for failing to label the x-axis. While an ANNOTATED Sheet is not required by the rules where the change is identified in the response, to facilitate matters, a Replacement Sheet and an Annotated Sheet for Figures 2 and 3 accompanies this paper.

As specifically suggested in the Office Action, Figure 2(B) now includes a "t" for a time label on the X-axis (similar to that of Figure 2(A)). Figure 3(B) now includes a "t" for time label on the X-axis (similar to that of Figure 3(A)). Approval and entry are respectfully requested.

The accompanying Drawing Sheets include one (1) Replacement Sheet and one (1) ANNOTATED Sheet (showing the added "t" in red in Figure 2(B) and the added "t" in red in Figure 3(B)).

Applicants respectfully request withdrawal of the objections and approval and acceptance of the Replacement and ANNOTATED Sheets of Figures 2 and 3.

Claim 9 was rejected under 35 U.S.C. § 112, second paragraph, as assertedly being indefinite. While the rejections may not be agreed with, to facilitate matters, claim 9 has been canceled and rewritten into claim 7. Applicants believe claim 7, as presented, is definite and allowable.

Claims 7, 10, 11, and 12 were rejected under 35 U.S.C. § 102(b) for assertedly being anticipated by U.S. Patent No. 6,238,021 ("Sugimoto").

As regards the anticipation rejections of the claims, to reject a claim under 35 U.S.C. § 102(b), the Office must demonstrate that each and every claim feature is identically described or contained in a single prior art reference. (See Scripps Clinic & Research Foundation v. Genentech, Inc., 18 U.S.P.Q.2d 1001, 1010 (Fed. Cir. 1991)). Still further, not only must each of

the claim features be identically described, an anticipatory reference must also enable a person having ordinary skill in the art to practice the claimed invention, namely the claimed subject matter of the claims, as discussed herein. (See *Akzo, N.V. v. U.S.I.T.C.*, 1 U.S.P.Q.2d 1241, 1245 (Fed. Cir. 1986)).

As further regards the anticipation rejections, to the extent that the Office Action may be relying on the inherency doctrine, it is respectfully submitted that to rely on inherency, the Office must provide a “basis in fact and/or technical reasoning to reasonably support the determination that the allegedly inherent characteristics *necessarily* flows from the teachings of the applied art.” (See M.P.E.P. § 2112; emphasis in original; and see *Ex parte Levy*, 17 U.S.P.Q.2d 1461, 1464 (Bd. Pat. App. & Int’f. 1990)). Thus, the M.P.E.P. and the case law make clear that simply because a certain result or characteristic may occur in the prior art does not establish the inherency of that result or characteristic. Accordingly, it is respectfully submitted that any anticipation rejection premised on the inherency doctrine is not sustainable absent the foregoing conditions.

Claim 7, as now presented, includes the features of canceled claim 9, and provides for “varying a time of initiating an emergency braking as a function of the determined achievable vehicle deceleration.” The Sugimoto reference does not identically disclose (or suggest) this feature and thus cannot anticipate claim 7. Even if Sugimoto may state that “if an abnormal road surface condition is sensed, the rising gradient of the braking force of the actual automatic braking is suppressed to a low level as denoted by the solid line”, (Sugimoto, col. 8, lines 29-32; and Figure 7), it is abundantly clear from Figure 7 and the related text that the emergency braking of Sugimoto starts at the same time regardless of the slip condition. The Sugimoto reference refers to a lowered braking slope, and does not disclose the feature of “varying a time of initiating an emergency braking as a function of the determined achievable vehicle deceleration,” as provided for in the context of the claimed subject matter.

Claims 10 and 11 depend from claim 7, are therefore allowable for at least the same reasons.

Claim 12, as now presented, includes features like those of claim 7, as presented, and are therefore allowable for the same reasons.

Claims 7, 10, and 11 were rejected under 35 U.S.C. § 103(a) as assertedly being unpatentable over U.S. Patent No. 4,048,613 (“Ito”) in view of DE-4310354 (“DE354”).

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In rejecting a claim under 35 U.S.C. § 103(a), the Office bears the initial burden of presenting a *prima facie* case of obviousness. *In re Rijckaert*, 9 F.3d 1531, 1532, 28 U.S.P.Q.2d 1955, 1956 (Fed. Cir. 1993). To establish *prima facie* obviousness, three criteria must be satisfied. First, there must be some suggestion or motivation to modify or combine reference teachings. *In re Fine*, 837 F.2d 1071, 5 U.S.P.Q.2d 1596 (Fed. Cir. 1988). This teaching or suggestion to make the claimed combination must be found in the prior art and not based on the application disclosure. *In re Vaeck*, 947 F.2d 488, 20 U.S.P.Q.2d 1438 (Fed. Cir. 1991). Second, there must be a reasonable expectation of success. *In re Merck & Co., Inc.*, 800 F.2d 1091, 231 U.S.P.Q. 375 (Fed. Cir. 1986). Third, the prior art reference(s) must teach or suggest all of the claim features. *In re Royka*, 490 F.2d 981, 180 U.S.P.Q. 580 (C.C.P.A. 1974).

Claim 7, as presented, includes the feature of being “responsive to one of the braking force and a correlated state variable attaining a defined maximum value, ceasing the increasing of the braking force; determining an achievable vehicle deceleration during the preliminary warning braking; responsive to one of the braking force and a correlated state variable attaining a defined maximum value, using a high estimated value of the attainable vehicle deceleration.” None of the relied upon references disclose this feature.

The Office construed claim 9, the features of which are now in claim 7, as claiming either of two options. However, it is clear from the Specification and the claim itself that the claim includes the feature of “increasing a braking force” until the *first in time* of either of the two events occurring. While the Office’s interpretation of the claim is not agreed with, the claim has been rewritten to better clarify the claimed subject matter. As presented, claim 7 requires a “defined maximum value” for the “braking force or correlated state variable”. No cited reference discloses this feature, and claim 7, as presented, should be allowed.

Claims 10 and 11 ultimately depend from claim 7, and are therefore allowable for at least the same reason.

Claims 8, 9, and 12 were rejected under 35 U.S.C. § 103(a) as assertedly being unpatentable over U.S. Patent No. 4,048,613 (“Ito”) in view of DE-4310354 (“DE354”) in further view of U.S. Patent No. 6,322,163 (“Siegel”).

Claim 9 has been canceled without prejudice.

The Siegel reference does not disclose the claim feature explained above as to claim 7, as presented. Accordingly, Siegel does not cure – and is not asserted to cure - the deficiencies of Ito in view of DE354 as to claim 7, as presented.

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Claim 8 depends from claim 7, and is therefore allowable for at least the same reasons.

Claim 12, as presented, includes features like those of claim 7, and therefore allowable for essentially the same reasons.

Claims 8 and 9 were rejected under 35 U.S.C. § 103(a) as being unpatentable over Sugimoto in view of the Siegel reference.

Claim 9 has been canceled without prejudice.

Neither Sugimoto nor Siegel disclose the claim feature as explained as to claim 7, as presented. Therefore, taken alone or together they do not disclose all of the claim features of claim 7, as presented.

Claim 8 depends from claim 7 and is therefore allowable for at least the same reasons.

New claims 13 to 17 do not add any new matter and are supported by the present application. Claims 13 to 16 depend from claim 12, as presented, and are therefore allowable for the same reasons as claim 12. Claim 17 depends from claim 7, as presented, and is therefore allowable for the same reasons as claim 7.

Accordingly, claims 7, 8 and 10 to 17 are allowable.

CONCLUSION

In view of the above, it is respectfully submitted that all of the presently pending claims 7, 8 and 10 to 17 are allowable. It is therefore respectfully requested that the rejections (and any objections) be withdrawn, since they have been obviated. Since all issues raised have been addressed, an early and favorable action on the merits is respectfully requested.

Respectfully submitted,

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